STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

ROBERT GLADYCH,

Plaintiff-Appellee,

Case No. 119948

vs.

Court of Appeals No: 222343

NEW FAMILY HOMES, INC.

Macomb Circuit Case No: 99-000264-NI

Defendant-Appellant.

_____/

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7), arguing that Plaintiff failed to properly file and serve the Complaint and Summons pursuant to MCL § 600.5856. The trial court granted the motion. (*See* Appendix, Ex. J, Order Granting Summary Disposition, pp. 40A-41A). Plaintiff appealed. On June 5, 2001, the Michigan Court of Appeals reversed the trial court and determined that § 5856 did not apply. (*See* Appendix, Ex. K, Opinion of the Court of Appeals, pp. 42A-43A). The Court of Appeals further stated that an action commences pursuant to MCR 2.101(B) "when a Complaint is filed." (*See* Appendix, Ex. K, Opinion of the Court of Appeals, 42A-43A). Defendant sought rehearing, which the Court of Appeals denied on August 2, 2001. (*See* Appendix, Ex. L, Denial of Rehearing, 44A). On July 31, 2002, this Court granted leave to appeal. (*See* Appendix, Ex. M, Order Granting Leave to Appeal, 45A).

This Court has jurisdiction to hear this appeal pursuant to MCL §§ 600.212 - .219 and MCR 7.301(2).

QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS ERR BY ALLOWING PLAINTIFF TO MAINTAIN HIS CAUSE OF ACTION EVEN THOUGH HE FAILED TO SERVE THE SUMMONS AND COMPLAINT WITHIN THE LIMITATIONS PERIOD STATED IN MCL § 600.5856?

   Plaintiff-Appellee Answers "No."

   Defendant-Appellant Answers "Yes."

2. IS THE CASE OF *BUSCAINO V. RHODES*, 385 MICH 474 (1971), INCONSISTENT WITH THE LANGUAGE OF MCL § 600.5856 TO THE EFFECT THAT A CIVIL ACTION IS COMMENCED BY SERVING A COMPLAINT AND SUMMONS ON THE DEFENDANT WITHIN THE STATUTORY PERIOD AND SHOULD *BUSCAINO* BE OVERRULED OR MODIFIED?

   Plaintiff-Appellee Answers "No."

   Defendant-Appellant Answers "Yes."

   Court of Appeals Answered "No."

I. PROCEDURAL HISTORY

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7), arguing that Plaintiff failed to properly file and serve the Complaint and Summons pursuant to MCL § 600.5856, which requires a party to ***file and serve both the Complaint and Summons*** within the statutory limitations period. The trial court heard and granted the motion on August 26, 1999. (*See* Appendix, Ex. I, Tr. Of Summary Disposition Hearing, 33A-39A; Ex. J, Order Granting Summary Disposition, 40A-41A).

Plaintiff appealed. On June 5, 2001, the Michigan Court of Appeals reversed the trial court and determined that § 5856 did not apply because the statute was merely a "tolling" statute. (*See* Appendix, Ex. K, Court of Appeals Op., 42A-43A). The Court of Appeals further stated that an action commences pursuant to MCR 2.101(B) "when a Complaint is filed." (*See* Appendix, Ex. K, Court of Appeals Op., 42A-43A). *See also* MCL § 600.1901 (*See* Appendix, Ex. P, 45A) (legal action commences at filing of Complaint). The Court of Appeals then denied Defendant's request for a rehearing. (*See* Appendix, Ex. L, Denial of Rehearing, 8/2/01, 44A). Defendant filed an application for leave to appeal to this Court. On July 31, 2002, this Court granted leave to hear these issues on appeal. (*See* Appendix, Ex. M, Order Granting Leave to Appeal, 45A). Defendant-Appellant now asks this Court to reverse the decision of the Court of Appeals and find that Plaintiff's claim is barred pursuant to MCL § 600.5856.

II. BACKGROUND

A. STATEMENT OF FACTS

In this personal injury action, Plaintiff-Appellee Robert Gladych ("Plaintiff") alleged that he was injured when he fell from a roof while he was under the employment and direction of Defendant-Appellant New Family Homes, Inc. ("Defendant NFH") on January 23, 1996. (*See*

Appendix, Ex. A, Complaint, ¶¶ 2-6, 18, pp. 1A-5A). Under the applicable statute of limitations, MCL 600.5805(1), (9), Plaintiff had three years in which to toll the limitation period, *i.e.*, he had to implement an action prior to January 23, 1999. *See* MCL § 600.5805(1), (9).

MCR 2.101(B) and MCL § 600.1901 both state that a plaintiff "commences" an action upon the filing of the Complaint. However, the Legislature and the courts may impose additional requirements on a plaintiff beyond the mere filing of a Complaint, such as requiring the issuance and service of a Summons from the Court. *See* MCR 2.102 (requiring the plaintiff to serve the defendant with a Summons). One of the Legislature's additional requirements is contained in MCL § 600.5856 (*See* Appendix, Ex. P, 56A), which provides in pertinent part:

> The statutes of limitation or repose are tolled:
>
> (a) At the time the complaint is filed and a copy of the summons and complaint are served on the defendant.
>
> (b) At the time jurisdiction over the defendant is otherwise acquired.
>
> (c) At the time the complaint is filed and a copy of the summons and complaint in good faith are placed in the hands of an officer for immediate service, but in this case the statute is not tolled longer than 90 days after the copy of the summons and complaint is received by the officer.

The statute requires a plaintiff to serve the Summons and Complaint on the defendant in order to toll or halt the limitations period. *Id.* Alternatively, the plaintiff can give a copy of the Summons and Complaint to an officer for immediate service in order to toll the limitations period. *Id.*

On January 22, 1999, Plaintiff filed his Complaint in Macomb County Circuit Court, just one day prior to the expiration of the applicable statute of limitation. *See* MCL § 600.5805(1), (9) (three-year statute of limitations for personal injury actions). The trial court issued a Summons that expired on April 23, 1999. (*See* Appendix, Ex. B, Original Summons, 6A-7A).

However, the statute of limitations continued to run because, contrary to the requirements of MCL § 600.5856, Plaintiff (i) failed to serve a copy of the Summons and Complaint on Defendant prior to January 23, 1999; **and** (ii) failed to place a copy of the Summons and Complaint in the hands of an officer for service of process until March 16, 1999—well after the three-year limitation period had expired. (*See* Appendix, Exs. C & D, Affidavits of Heather Ware and Deputy Sheriff Louis A. Guiette, 8A-10A).

Nonetheless, Plaintiff then petitioned *ex parte* for and obtained a second Summons on April 20, 1999. (*See* App., Ex. E, Second Summons, 11A). The second Summons expired on July 20, 1999. (*See* App., Ex. E, Second Summons, 11A). Plaintiff finally obtained service of process on Defendant NFH on or around May 4, 1999—more than three months after the applicable statute of limitation had expired. (*See* App., Ex. F, Plaintiff's Counsel-Letter, 12A).

Defendant NFH promptly motioned the trial court for summary disposition pursuant to MCR 2.116(C)(7), which empowers the trial court to dismiss a claim where "[t]he claim is barred because of . . . statute of limitations." (*See* Appendix, Ex. G, Defendant's Motion for Summary Disposition, 13A-26A). Defendant NFH argued that the three-year statute of limitation had expired because Plaintiff had failed to serve Defendant or place the Summons and Complaint with "an officer for immediate service." MCL § 600.5856. The trial court agreed that § 5856 required Plaintiff to do more than just file his claim against Defendant NFH in order to toll the statute of limitations. (*See* Appendix, Ex. I, Tr., 7/26/99 Motion Hearing, 33A-39A). Accordingly, the trial court granted Defendant NFH's motion for summary disposition. (*See* Appendix, Ex. J, Order Granting Summary Disposition, 40A-41A).

On appeal, Plaintiff argued that he had complied with the statute of limitation merely by filing his Complaint within the statutory period pursuant to MCR 2.101(B) and MCL §

600.1901, both of which provide that a party commences an action by "filing . . . the Complaint." (*See* Appendix, Ex. P, 55A). Plaintiff contended that he fully complied with the court rule and § 1901 even though he placed the Summons in the hands of an officer for service of process ***after*** the three-year statute of limitation on his personal injury action expired. To support his argument, Plaintiff relied on the antiquated case of *Buscaino v. Rhodes*, 385 Mich 474; 189 NW2d 202 (1971). In *Buscaino*, the Supreme Court held that § 5856 applied only to issues of "tolling" *when a prior case between the parties already had been filed. Id.* at 482; 189 NW2d at 205. Consequently, the *Buscaino* plaintiff adequately "commenced" the lawsuit by the mere filing of the Complaint. *Id.* Plaintiff here contended that *Buscaino* dictated a result in his favor.

Defendant NFH reiterated its argument that § 5856 unambiguously required Plaintiff to at least satisfy the "good faith" requirement by placing the Summons in the hands of an officer for service prior to the expiration of the statute of limitations. By failing to do so, Plaintiff did not meet the requirements of § 5856 and thus did not toll the statute of limitations, which expired before Plaintiff ever served Defendant NFH with the Summons and Complaint.

The Court of Appeals, however, disagreed with Defendant NFH and determined that Plaintiff complied with MCR 2.101(B) and § 1901 by filing the Complaint prior to the running of the statute of limitations. (*See* Appendix, Ex. K, Court of Appeals Op., 42A-43A). The appellate court, cursorily relying on *Buscaino,* held that Plaintiff in this case similarly "commenced" his action by simply filing his Complaint one day prior to the expiration of the limitations period. (*See* Appendix, Ex. K, Court of Appeals Op., 42A-43A). Defendant NFH respectfully contends that this Court incorrectly decided *Buscaino* and requests that the present Court reverse that decision.

B. *BUSCAINO V. RHODES*: COURT RULE VS. STATUTE

1. The Pre-*Buscaino* Cases

As of 1963, Michigan had a statute, similar to MCR 2.101(B), that stated that a plaintiff commenced an action by filing a Complaint with the court. *See* MCL § 600.1901 (enacted in 1961; effective 1/1/63). Even so, Michigan case law prior to the *Buscaino* decision considered § 5856 the definitive statute and/or rule for fully filing a proper Complaint and providing the defendant with the requisite notice. The courts presumably understood that a plaintiff may *commence* an action by filing a complaint, but the plaintiff still had other obligations to pursue before the statute of limitations would toll.

In *Sylvester v Messler*, 246 F Supp 1 (ED Mich 1964), a federal court, interpreting Michigan law in a diversity case, addressed a statute of limitations issue pursuant to § 5856. The plaintiff had filed suit within the statute of limitations, but had not placed the Complaint in the hands of an "officer for service" until the expiration of the limitations period. *Id.* at 2. Instead, the plaintiff's attorney tried to serve the Complaint himself, but failed to adequately do so. *Id.* The court held that the plaintiff failed to meet the requirements of § 5856 and thus her claim was barred. *Id.* Notably, the court never addressed MCR 2.101(B) (already in effect) or § 1901, apparently conceding that § 5856 controlled the outcome.

The Michigan Court of Appeals affirmed this interpretation in *Constantini v. Hofer*, 5 Mich App 597; 147 NW2d 433 (1967). The *Constantini* Court confirmed that an attorney was not an "officer" within the meaning of § 5856. As a result, the plaintiff, who gave the Complaint and Summons to an attorney, failed to adequately place the Summons and Complaint in the hands of an "officer" within the statutory period. *Id.* at 601, 147 NW2d at 435. *See also Coleman v Bolton*, 24 Mich App 547; 180 NW2d 319 (1970) (process server was not an "officer

for immediate service" pursuant to § 5856 and the statute of limitations barred plaintiff's claim). Again, these cases never addressed a conflict between § 1901, MCR 2.101(B) and § 5856.

Even in 1971—the same year that the Michigan Supreme Court decided *Buscaino*—Michigan courts continued to adhere to the requirements of § 5856 for determining the limitations period. In *Kyes v Pisco*, 31 Mich App 72; 187 NW2d 551 (1971), the Michigan Court of Appeals held that the plaintiff's claim was barred because she provided her Summons and Complaint to the circuit court commissioner's clerk, who was not an appropriate "officer" within the meaning of § 5856. *Id.* at 75, 187 NW2d at 553. In *Uchwat v U-Haul Rent-A-Truck*, 28 Mich App 427; 184 NW2d 566 (1971), the Court of Appeals permitted the plaintiff's claim because the plaintiff had provided the Summons and Complaint to a sheriff (albeit the incorrect sheriff) in good faith and thus complied with the requirements of § 5856. *Id.* at 429-30, 184 NW2d at 568. Both cases applied § 5856 to the commencement of actions.

All of these pre-*Buscaino* cases indicate that the Michigan courts consistently applied § 5856 to situations concerning the limitations period and the commencement of an action. If a plaintiff failed to either serve the Summons on the defendant or place it in the hands of an "officer" in good faith within the limitations period, then § 5856 barred the plaintiff's claim. These cases found no inherent conflict with MCR 2.101(B) or § 1901, presumably because the courts believed that the additional requirements of § 5856, not the rules regarding "commencement" of the action, controlled the outcome. Without a substantial rationale, the *Buscaino* decision altered this trend by applying § 5856 only in limited circumstances.

2. The *Buscaino* Decision & Its Aftermath

In *Buscaino*, the plaintiffs filed their Complaint six days before the limitations period ended. 385 Mich at 477, 189 NW2d at 203. The plaintiffs then gave the Summons and

Complaint to a deputy sheriff for service on the same date that they filed the Complaint, but they instructed the sheriff to wait to serve the defendants until one of the defendants returned to Michigan. *Id.* The sheriff did not serve the defendants until nearly two months after the limitations period expired. *Id.* The trial court and the Michigan Court of Appeals ruled that § 5856 barred plaintiffs' cause of action because the plaintiffs had not given the sheriff the Summons and Complaint for "immediate service." *Id.* at 478, 189 NW2d at 203.

On appeal, this Court recognized the separation of powers between the courts and the Legislature, noting the Court's authority to implement general rules pertaining to "practice and procedure" in Michigan courts. *Id.* (citing MICH. CONST. 1963, art. 6, § 5). The Court also stated that statutes of limitations are often "procedural" in nature and then cited GCR 1963, 101 (precursor to MCR 2.101(B)), which provided that "[a] civil action is commenced by filing a complaint with the court." *Id.* at 480, 189 NW2d at 204. Acknowledging that GCR 1963, 101 required less than § 5856 for a plaintiff to commence a complaint, the Court found "a seeming conflict between the Court Rule and the legislative act . . ." *Id.* at 480, 189 NW2d at 205.

Despite this "seeming" conflict, the *Buscaino* Court determined that the § 5856 had "nothing to do with when an action is commenced," but only when an action is tolled. 385 Mich at 481, 189 NW2d at 205. Instead, the Court turned to GCR 1963, 101 [MCR 2.101] to find that a plaintiff commences a cause of action "upon the filing of the Complaint." In order to avoid a conflict between the court rule and the statute—and thus raise a constitutional question of which one controls—the Court instead opted for a strained interpretation of § 5856 contrary to all prior precedent:

> Since there can be no question of 'removing' the bar of the statute of limitations unless and until, in the absence of tolling the statute would have barred the action, there can be no issue of 'tolling' in any case where the action is

commenced within the statutory period of limitation.

> It is only when the action is not commenced within the statutory period—as determined by consulting the date of claim, the date of filing the complaint and a calendar—it is only when a prima facie bar of the statute appears, that tolling comes into play.

Id. at 481, 189 NW2d at 205. Put simply, the *Buscaino* Court held that § 5856 "deals only with prior lawsuits between the parties which have not adjudicated on the merits." *Id.* Consequently, although the *Buscaino* plaintiffs failed to properly serve the defendant within the limitations period or place the Summons in the hands of an "officer of the court," the court allowed them to maintain their cause of action because they filed their Complaint within the limitations period and satisfied the requirement of MCR 2.101(B). *Id.* at 484, 189 NW2d at 206. Overall, the *Buscaino* Court determined that § 5856 had no application to the case at bar and limited the application of § 5856 to those rare cases that are dismissed prior to full adjudication and then reinstated.

Despite *Buscaino's* circumspect decision, Michigan courts unquestioningly adhered to the *Buscaino* holding. *See, e.g., Goniwicha v Harkai*, 393 Mich 255; 224 NW2d 284 (1974); *Lausman v Benton Twp*, 169 Mich App 625; 426 NW2d 729 (1988). In *Terrace Land Development Corp v Seeligson & Jordan*, 250 Mich App 452; 647 NW2d 524 (2002), the Michigan Court of Appeals emphasized *Buscaino's* reach to current cases:

> We believe that *Buscaino* supports the proposition that where a party, for the first time, files suit against a defendant, the limitation period is measured at the time the complaint was filed pursuant to MCR 2.101(B). We further believe, pursuant to *Buscaino*, that MCL § 600.5856 comes into play where a party files suit beyond the limitation period and seeks to toll the time that elapsed during a previously dismissed lawsuit against the same defendant from the date of service, acquisition of jurisdiction, or placement of process with an officer for delivery until a dismissal that is not based on the merits of the action. Here, plaintiffs' complaint was an original filing, and there had been no previous complaint or dismissal involving defendants. Therefore, *Buscaino* **directs** us to conclude that

> plaintiffs' complaint was filed in accordance with MCR 2.101(B) within the statutory period, thereby precluding summary disposition under MCR 2.116(C)(7).

250 Mich App at 459-60, 647 NW2d at 527-28 (emphasis added). This Court's intervention is now necessary to clarify and remedy this incorrect interpretation of the law.

3. The *McDougall* Decision

In 1999, this Court faced a similar issue concerning the constitutionality of a Michigan statute that arguably conflicted with a court rule. The case of *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999), examined whether MCL § 600.2169, which provides certain requirements for the admission of expert testimony in medical malpractice cases, impermissibly infringed on the judiciary's exclusive authority to promulgate rules governing practice and procedure. More specifically, this Court had to decide whether the less stringent court rule (MRE 702) or the more demanding statute (MCL § 600.2169) constitutionally controlled the admissibility of expert testimony in medical malpractice cases. Mich. Const. 1963, art. 6, § 5.

The conflict stemmed from the conflicting authorities governing the admission of expert testimony. The court rule, MRE 702, provides:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

MRE 702. The broad language of the court rule permits trial court judges to determine the admissibility of an expert's qualifications and potential testimony without requiring the expert to be a certified specialist in the medical area in question.

However, as part of the Michigan tort reform in the mid-1990s, the Michigan Legislature imposed more stringent requirements on expert witnesses in medical malpractice cases. MCL §

600.2169 provides that a specialist cannot provide expert testimony in such cases unless s/he is a physician licensed to practice medicine or dentistry in Michigan and either

(i) specializes or specialized at the time of the occurrence in the same specialty or related specialty as the defendant in the case, or

(ii) devotes or devoted at the time of the occurrence, a substantial portion of his/her professional time to the active clinical practice of medicine or instruction at a medical school or other university in the same specialty or a relevant area.

MCL § 600.2169. The question in *McDougall* was whether the statute could constitutionally override the court rule and impose more stringent requirements on expert witnesses.

The *McDougall* Court first acknowledged the conflict between the statute and the court rule:

> Finally, it appears beyond dispute that the Legislature envisioned and intended that the statute would often compel different qualification determinations than the rule when applied a given case. As Judge Taylor noted in his dissent in *McDougall*, the Legislature became dissatisfied with the manner in which some courts were exercising their discretion regarding expert testimony, and enacted a statute designed to limit that discretion. Accordingly, given that § 2169 and MRE 702 clearly conflict, we must determine whether the statute impermissibly infringes upon this Court's constitutional authority to enact rules governing practice and procedure.

Id. at 25, 597 NW2d at 153. This Court then noted its primacy in enacting rules of practice and procedure pursuant to the Michigan Constitution. *Id.*. at 26, 597 NW2d at 154; MICH. CONST. 1963, art. 2, § 5. Pursuant to the doctrine of separation of powers, the Legislature may enact substantive law, but the rules of practice and procedure remain solely within the domain of the Court. *Id.*; MICH. CONST. 1963, art. 2, § 5. The preliminary question for the *McDougall* Court concerned whether § 2169 was procedural or substantive. If procedural, then the court rule would control; if substantive, the statute would control. *McDougall*, 461 Mich at 26-27, 597 NW2d at 154.

The *McDougall* Court acknowledged that prior cases blindly enforced the court rules without providing an analysis of the constitutional distinction between practice/procedure and substantive law. *Id.* at 29, 597 NW2d at 155; *see also Perin v. Peuler* (On Rehearing), 373 Mich 531, 541; 130 NW2d 4 (1964). Overruling this line of cases (including this portion of *Buscaino*), this Court determined the following:

> We conclude that a statutory rule of evidence violates Const. 1963, art. 6, § 5 only when "no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified." . . . Therefore, "if a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration . . . the court rule should yield."
>
> * * *
>
> We conclude that this common-sense approach properly gives effect to the constitutionally required distinction between 'practice and procedure' and substantive law.

Id. at 30-31, 597 NW2d at 156-57 (citing Joiner & Miller, *Rules of practice and procedure: A study of judicial rule making*, 55 MICH. L. REV. 623, 650-51 (1957)). The *McDougall* Court then determined that § 2169 was substantive in nature because it did not involve "the mere dispatch of judicial business." *Id.* at 35, 597 NW2d at 158. Consequently, the more detailed statute controlled over the less specific court rule with respect to the admission of the specialists' testimony. *Id.* at 36, 597 NW2d at 158-59 ("[B]ecause the Legislature is authorized to change a common-law cause of action or abolish it altogether, it necessarily has the ability to 'circumscribe those qualified to give the requisite proofs to establish the elements of the cause of action.'") (citations omitted). This Court now must decide if (i) a conflict between the MCR 2.101(B) [and MCL § 600.1901] and § 5856 exists and, if so, (ii) whether the *McDougall* reasoning applies to § 5856, thus implying that the tolling provision is substantive in nature.

III. ARGUMENT

THE COURT OF APPEALS ERRED BY HOLDING THAT THE PLAINTIFF TOOK PROPER STEPS TO TOLL THE THREE-YEAR STATUTE OF LIMITATION APPLICABLE TO HIS PERSONAL INJURY ACTION BY MERELY FILING HIS COMPLAINT ONE DAY PRIOR TO THE EXPIRATION OF THE LIMITATION PERIOD AND THEN NEGLECTING TO PLACE A COPY OF THE SUMMONS AND COMPLAINT IN THE HANDS OF AN OFFICER FOR IMMEDIATE SERVICE, CONTRARY TO THE PROVISIONS OF MCL § 600.5856.

A. STANDARD OF REVIEW.

MCR 2.116(C)(7) permits the trial court to dismiss a claim where "[t]he claim is barred because of . . . statute of limitations." In reviewing a decision whether to grant summary disposition under MCR 2.116(C)(7), the appellate court reviews the pleadings, affidavits, and other documentary evidence, construing them in the plaintiff's favor. "'**If no facts are in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a plaintiff's claim is barred by the statute of limitations is a question for the court as a matter of law.**'" *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234, 238; 625 NW2d 101 (2001) (citation omitted). An appellate court reviews *de novo* the decision whether to grant a motion for summary disposition pursuant to MCR 2.116(C)(7). *Id.*

Additionally, the central inquiry in this case concerns the constitutionality of MCL § 600.5856 and its inherent conflict with MCR 2.101(B). The constitutionality of the statute presents a question of law that this Court reviews *de novo*. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). Courts presume a statute to be constitutional unless its unconstitutionality is apparent. *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148, 153 (1999).

B. THE DOCTRINE OF STARE DECISIS DOES NOT BIND THIS COURT

Although the doctrine of *stare decisis* generally provides that a Court should adhere to its prior rulings, this Court is not bound by the doctrine of *stare decisis* to follow *Buscaino* if the Court incorrectly decided the prior decision. *See Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624, 635 (2002) (overruling an incorrect holding of this Court). The doctrine of *stare decisis* is "not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions determining the meaning of statutes." *Id.* (citation omitted). Instead, this Court must "re-examine a precedent where its reasoning . . . is fairly called into question." *Id.* This Court appropriately has overruled its earlier cases that are clearly inconsistent with the plain language of a statute. *Id.*; *Robinson v City of Detroit*, 462 Mich 439, 460; 613 NW2d 309, 318 (2000).

C. *BUSCAINO* WAS WRONGLY DECIDED BECAUSE § 5856 CONTROLS THE LIMITATIONS PERIOD

The clear and unambiguous language of § 5856 provides:

> The statutes of limitation or repose are tolled:
>
> (a) At the time the complaint is filed and a copy of the summons and complaint are served on the defendant.
>
> (b) At the time jurisdiction over the defendant is otherwise acquired.
>
> (c) At the time the complaint is filed and a copy of the summons and complaint in good faith are placed in the hands of an officer for immediate service, but in this case the statute is not tolled longer than 90 days after the copy of the summons and complaint is received by the officer.

MCL § 600.5856. This Court presumes that the Legislature understands the meaning of the language it enacts into law. *Carr v General Motors Corp*, 425 Mich 313, 317; 389 NW2d 686 (1986). As a result, courts must adhere to the plain and unambiguous language of a statute.

Robinson, 613 NW2d at 318; *City of Lansing v Lansing Twp*, 356 Mich 641, 649; 97 NW2d 804 (1959).

Prior to *Buscaino*, Michigan courts consistently held that § 5856 required a plaintiff to obtain or attempt to obtain service of process to fully perfect the filing of a lawsuit. *See Constantini v Hofer*, 5 Mich App 597; 147 NW2d 433 (1967); *Hoseney v Zantop*, 17 Mich App 141; 169 NW2d 124 (1969); *Coleman v Bolton*, 24 Mich App 547; 180 NW2d 319 (1970); *Kyes v Pisco*, 31 Mich App 72; 187 NW2d 551 (1971); *Uchwat v U-Haul Rent-A-Truck*, 28 Mich App 427; 184 NW2d 566 (1971); *Sylvester v Messler*, 246 F Supp 1 (1964). These decisions did not find a conflict between the court rule [MCR 2.101(B)] and § 5856, presumably because the two controlled different aspects of the case, namely commencement and tolling respectively.

Indeed, MCR 2.101(B), like its statutory counterpart MCL § 600.1901, merely informs the Court when an action commences. The plain language of the court rules and the corresponding statute, § 1901, address nothing more than "commencement" or initiation of the lawsuit. Black's Law Dictionary defines the term "commence" as follows:

> **To initiate by performing the first act or step. To begin, institute or start.** [Emphasis added].

BLACK'S LAW DICTIONARY (6th ed., p. 183). Based on this "plain" definition, MCR 2.101(B) sets forth only the "commencement" or "first step" that a plaintiff must meet to properly and completely file a lawsuit. Similarly, the court rules require a plaintiff to obtain and serve a Summons on the defendant (a "second step") without providing a time period for service of the Complaint and Summons. *See* MCR 2.102.

Instead, the Legislature controls the limitations period for any action. MCL § 600.5856 provides an additional time limitation to "toll" the statute of limitations when a plaintiff already

has commenced an action pursuant to MCR 2.101 and MCL § 600.1901. Black's Law Dictionary defines the word "toll" as an action that "bar[s], defeat[s], or take[s] away." BLACK'S LAW DICTIONARY (6th ed. 1035). The plain meaning of § 5856 requires a plaintiff to adequately serve the defendant or place the Summons and Complaint in the hands of an officer for service to "bar, defeat or take away" the statute of limitations, *i.e.,* to stop the statute from continuing to run. Consequently, MCR 2.101(B) and MCL § 1901 work in conjunction with § 5856 to ensure that the plaintiff properly meets the statute of limitations and perfects the filing of the lawsuit.

Nonetheless, the *Buscaino* Court overlooked this simple coexistence between § 5856 and MCR. 2.101(B) by finding a "seeming" conflict when one never existed. The *Buscaino* decision reversed all established case law by limiting § 5856 to those cases that had been dismissed without full adjudication. *Buscaino*, 385 Mich at 482-83, 189 NW2d at 205-06. In doing so, the *Buscaino* Court provided plaintiffs with a much longer window of opportunity for service of process at the expense of virtually discarding § 5856. Such an interpretation **directly contradicted the express and unambiguous language of § 5856** by judicially lengthening the statute of limitations and limiting § 5856 to those certain limited circumstances when a case has been dismissed and reinstated. The statute reads that the "statute of limitations or repose are tolled" when a plaintiff performs one of three requirements. **Nothing in § 5856 implies that the Legislature intended that § 5856 would apply in the limited circumstances suggested in *Buscaino***. The *Buscaino* Court failed to adhere to the standard rules of construction and read the statute according to its own meaning. Any conflict with MCR 2.101 served as a red herring for

Committee Comments cited in *Buscaino* cannot adequately support the opinion. *Buscaino*, 385 Mich at 482, 189 NW2d at 206 (citing 34 M.C.L.A. p. 945 and Vol 23 Stat. Ann., p. 136). The Comments note only that the statute of limitations are tolled if an action is dismissed (other than on the merits) and reinstated, *i.e.*, the time between when the plaintiff serves the defendant in the first suit until dismissal will not count against the plaintiff in the second suit. *Id.* Such a Comment comports with fundamental notions of fairness, but does not necessarily limit § 5856 to that specific situation. Additionally, the Committee Comments provide commentary on many different forms of the statute and are not binding. It is unclear whether the *Buscaino* Court used Committee Comments from the actual enacted version of § 5856 as support for its opinion.

Further, other Committee Comments from § 5856 hint at the Legislature's intent to impose additional requirements on the plaintiff (*e.g.*, the service of process on defendant) in order to "toll" the limitations period:

> The mere act of filing a complaint should not toll the statute, as a matter of policy. . . . It is unrealistic to argue that defendants are put on notice of a lawsuit merely because a public court record exists to that effect. The defendant has a vital interest in being informed of the pendency of an action against him. Thus we have sought to enable a plaintiff to avoid the bar of a statute of limitation by taking the proper steps of establishing a court record (filing a complaint) and **complying with the requirements of a method reasonably calculated to give a defendant notice.** At the same time, we have required the plaintiff to prosecute his action diligently by the imposition of a maximum tolling period. The rights of both parties are thus protected. . . .
>
> The section does not constitute any radical departure from presently accepted principles, but it prescribes a definite procedure to be utilized wherein counsel are informed of the necessary steps which will guarantee the tolling of the statute of limitation. . . .
>
> * * *
>
> In summary, a method has been provided whereby a plaintiff, **by taking the proper steps**, can toll the statute of limitation on his cause of action for a maximum period of 90 days. . . . [Emphasis added.]

Bratton v Trojan Boat Co, 19 Mich App 236, 245-246; 172 NW2d 457 (1969), *aff'd* 385 Mich 585; 189 NW2d 206 (1971) (citing Committee Comments in 23 Stat. Ann. 1962 Rev., pp. 135, 136). Such language implies that the Legislature understood the interplay between the commencement of an action and the "tolling" of the limitations period—as the clear language of the statute indicates.

Read as a whole, MCR 2.101(B) and MCL § 600.5856 coexist without conflict. MCR 2.101(B) signals the "commencement" or "first step" of the action. MCL § 600.5856 provides the time limitations for the filing of a claim and may (or may not) impose additional requirements on a plaintiff to properly file the lawsuit. MCL § 600.5805 determines the amount of time that the plaintiff has to file his claim, *e.g.,* three years for a personal injury action. The plain meaning of the statutes and the court rule indicate nothing more. For this reason, this Court should overrule *Buscaino* and hold that a plaintiff (i) must file a Complaint with the court to "commence" the lawsuit pursuant to MCR 2.101(B) and MCL § 600.1901, and then (ii) must meet the requirements of § 5856 to sufficiently "toll" or stop the three-year statute of limitations.

D. IF THIS COURT FINDS THAT MCL § 600.5856 CONFLICTS WITH MCR 2.101(B), THEN THE STATUTE RATHER THAN THE COURT RULE CONTROLS THE OUTCOME BECAUSE THE ISSUE IS SUBSTANTIVE IN NATURE

1. Separation of Powers

The Michigan Constitution expressly establishes the Court's authority to enact court rules and procedures:

> The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.

Mich. Const. 1963, art. 6, § 5. The Legislature has recognized this primacy throughout Michigan's constitutional history. *See* Mich. Const. 1908, art. 7, § 5; Mich. Const. 1850, art. 6,

§ 5. Principles of separation of powers under the Constitution reinforce this Court's exclusive authority as to rule-making in matters of practice and procedure; the Legislature cannot meddle in these affairs. *McDougall*, 461 Mich at 26-27, 597 NW2d at 154 (citations omitted). By the same token, the Court cannot invade the Legislature's domain and enact court rules that contravene or abrogate the substantive law; the Court's authority "extends to only matters of practice and procedure." *Id.* at 27, 597 NW2d at 154.

If a conflict between the statute and the court rule exists, this Court must decide whether the question presents a procedural issue or a question of substantive law. If the issue is of a procedural nature, then the court rule controls the outcome. However, if the issue presents an issue of substantive law, then the statute dictates the result. *McDougall*, 461 Mich at 26-27, 597 NW2d at 154. Here, Defendant-Appellant NFH does not believe that a conflict exists between MCR 2.101(B) and MCL § 600.5856. *See* Argument, *supra*. Even so, if a conflict does exist between the court rule and the statute, such a conflict addresses an issue of substantive law (statute of limitations) and § 5856 would control the outcome of this case.

2. § 5856 Is Substantive In Nature

Statutes of limitation serve important purposes characterized as both procedural and substantive. Limitation periods are aimed at the efficient administration of justice **and**, generally, preservation of the right to a fair trial based on accessible and reliable evidence. In *Nielsen v Barnett*, 440 Mich 1, 8-9; 485 NW2d 666 (1992), this Court set forth various reasons for the imposition of statutes of limitation:

> As with common-law interest, Michigan law has long provided that the resolution of claims in court actions is subject to periods of limitation. By enacting a statute of limitations, **the Legislature determines the reasonable period of time given to a plaintiff to pursue a claim. The policy reasons behind statutes of limitations include: the prompt recovery of damages, penalizing plaintiffs**

> **who are not industrious in pursuing claims, security against stale demands, relieving defendants' fear of litigation, prevention of fraudulent claims, and a remedy for general inconveniences resulting from delay**. . . . [Emphasis added.]

Similarly, in *Mair v Consumers Power Co*, 419 Mich 74, 80; 348 NW2d 256 (1984), this Court stated:

> [We have] long recognized the value of a statute of limitations. In *Shadock v Alpine Plankroad Co*, 79 Mich 7, 13; 44 NWd 158 (1889), Justice CAMPBELL said:
>
> > "The whole reason for statutes of limitation is found in the danger of losing testimony, and of finding difficulty in getting at precise facts."
>
> In *Wells v The Detroit News, Inc*, 360 Mich 634, 639; 104 NW2d 767 (1960), we said that the "statute of limitations was designed to eliminate stale claims." And in *Bigelow v Walraven*, 392 Mich 566, 570; 221 NW2d 328 (1974), **we said that "the statute of limitations is not a disfavored plea but a perfectly righteous defense, a meritorious defense.**" See, also, *Lothian v Detroit*, 414 Mich 160; 324 NW2d 9 (1982). For these reasons, it is the general rule that exceptions to statutes of limitation are to be strictly construed. . . . [Citations omitted; emphasis added).]

Notably, the *Buscaino* Court cited this passage in support of its argument and thus acknowledged the *additional substantive purposes* behind statutes of limitations. *Buscaino*, 385 Mich at 483; 189 NW2d at 206.

Regardless of the significant substantive purposes underlying the statutes of limitation, courts generally, albeit unquestioningly, have recognized that statutes of limitation are procedural rules subject to the Supreme Court's broad and exclusive power "to make rules affecting procedure in all courts of our state." *Buscaino*, 385 Mich at 480; 189 NW2d at 204. However, this Court decided *Buscaino* at a time when it automatically deferred to court rules and rules of evidence that traditionally were considered "procedural" in nature.

This Court's more recent decision in *McDougall* case indicated a significant departure

from prior precedent and a change in perspective. In *McDougall,* this Court reversed its earlier holdings (including a portion of *Buscaino*) that failed to recognize the "constitutionally required distinction between 'practice and procedure' and substantive law" when deciding that certain legislative rules unconstitutionally interfered with the Supreme Court's exclusive authority over matters of procedural significance. *McDougall*, 461 Mich at 29, 597 NW2d at 155. Instead, the *McDougall* Court proposed a new test to evaluate these conflicts of substantive law and procedure:

> However, **we now recognize that [this Court] failed to consider the constitutionally required distinction between "practice and procedure" and substantive law and thus overstated the reach of our rule-making authority**. We will not continue mechanically to characterize all statutes that resemble "rules of evidence" as relating solely to practice and procedure. Such an analysis merely begs the question what makes a particular "rule of evidence" procedural as opposed to substantive in nature. We instead adopt a more thoughtful analysis that takes into account the undeniable distinction "between *procedural* rules of evidence and evidentiary rules of substantive law . . . ." This distinction is one that was not only advocated by recognized scholars contemporaneously with the development and passage of our 1963 constitution, but one that, as further explained below, the drafters contemplated.
>
> We conclude that a statutory rule of evidence violates Const 1963, art 6, § 5 only when "'no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified . . . .'" **Therefore, "[i]f a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration . . . the [court] rule should yield**." [Emphasis added.]

McDougall, 461 Mich at 29, 597 NW2d at 155-56 (citations omitted) (footnotes omitted).

In light of *McDougall*, the test for determining the substantive or procedural nature of a particular issue now centers on "the judicial dispatch test." *See* Allen L. Lanstra, Jr., *McDougall v. Schanz: Distinguishing the Authorities of the Michigan Legislature and the Supreme Court to Establish Rules of Evidence*, 2000 L. REV. M.S.U.-D.C.L. 857. Applying this test, the statute of limitations provides more than the efficient administration of justice for court administration. §

5856 reflects a legislative policy that enhances the true purpose of the statute of limitations—protection of defendants from stale claims. Due process requires the plaintiff to notify the defendant of the lawsuit or at least make an effort to notify the defendant by placing the complaint and summons with a qualified officer. Otherwise, as *Buscaino* allows, a plaintiff may file his/her Complaint, allow the Summons to expire after the original 91 days, and then can obtain a second Summons with consent of the court. MCR 2.102(D). Defendant potentially may not receive notice of the Complaint and Summons until nearly one year days has passed, but then cannot object to any delay because Plaintiff formerly complied with MCR 2.101(B). *See* MCR 2.102(D). In the interim, Plaintiff has time to accrue information, develop a theory of the case before actually serving the defendant(s), and make an end run around the statute of limitations. § 5856 remedied this situation prior to *Buscaino*.

The substantive/procedural issue is further clouded with respect to the limitations periods in *Erie* situations. Federal courts consider statutes of limitations to be substantive for *Erie* purposes, although such statutes are often considered procedural for purposes of choice of law. *Phelps v McClellan*, 30 F3d 658, 661 (CA 6, 1994); *Guaranty Trust Co v York*, 326 US 99 (1945); *Erie RR Co v Tompkins*, 304 US 64 (1938). This discrepancy illustrates the problems and confusion that courts face when deciding issues of substance and procedure. Statutes of limitations and tolling provisions may be much more than procedural devices. They also embody principles of economic and social interests that represent the defendant's right to know that s/he will not be subject to suit at a much later time; the statute becomes similar to a "right" upon which the defendant may rely.

In this case, § 5856 serves a specific purpose—to toll the limitations period when a plaintiff has met the statute's requirements—and ensures that the defendant has notice of

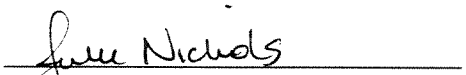
plaintiff's claim. Due process implications reinforce the importance of § 5856 and remove the statute from the procedural realm. Overall, § 5856 does more than merely address judicial business. The Legislature saw fit to enact the statute and this Court should give the statute its full meaning and effect. To this purpose, Defendant NFH respectfully requests that this Court, if it finds a conflict exists, hold that § 5856 is substantive in nature and controls over MCR 2.101(B) because § 5856 does more than simply ensure court efficiency.

IV. RELIEF REQUESTED

For the stated reasons, Defendant-Appellant NFH respectfully requests this Court REVERSE the decision of the Court of Appeals and hold that Plaintiff's claim is barred pursuant to MCL § 600.5856.

Respectfully submitted,

HARVEY KRUSE, P.C.

By: 

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Dated: September 23, 2002

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

ROBERT GLADYCH,

Plaintiff-Appellee,

Case No. 119948

vs.

Court of Appeals No: 222343
NEW FAMILY HOMES, INC. Macomb Circuit Case No: 99-000264-NI

Defendant-Appellant.

_____/

PROOF OF SERVICE

STATE OF MICHIGAN)
)
COUNTY OF OAKLAND)

I, KELLY ANN WALNY, being first duly sworn, depose and state that on the 24th day of September, 2002, I served two copies of Defendant-Appellant's Brief on Appeal, corresponding Appendix, and this Proof of Service on counsel for Plaintiff-Appellee at the following address:

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by enclosing said copies in a well-sealed envelope with full legal postage prepaid and I deposited the same in the United States mailbox in the City of Troy, County of Oakland.

KELLY A. WALNY

Sworn and Subscribed Before
Janice A. Carroll
Notary Public, Expiration Date

JANICE A. CARROLL
NOTARY PUBLIC MACOMB CO., MI
MY COMMISSION EXPIRES Jan 24, 2004